

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. _____

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	COMPLAINT
)	
RUSS HUSEBY AND BRADY HUSEBY)	
)	
Defendants.)	

Plaintiff, the United States of America, by and through its undersigned attorneys, alleges as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under sections 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319(b) and (d), to obtain injunctive relief and civil penalties against Russ Huseby and Brady Huseby for the discharge of pollutants into waters of the United States in Lake County, Minnesota. Because the Secretary of the Army, acting through the Chief of Engineers ("the Corps"), did not authorize the discharge under CWA section 404, 33 U.S.C. § 1344, the discharges violated CWA section 301(a), 33 U.S.C. § 1311(a).

2. By this action, the United States seeks to: (1) enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33

U.S.C. § 1311(a); (2) require Defendants, at their own expense and at the direction of the Corps, to restore and/or mitigate the damages caused by their unlawful activities; and (3) require Defendants to pay civil penalties as provided in CWA section 309(d), 33 U.S.C. § 1319(d).

AUTHORITY AND NOTICE

3. Authority to bring this action is vested in the United States Department of Justice under 28 U.S.C. §§ 516 and 519 and in accordance with CWA sections 309(b) and 309(d), 33 U.S.C. §§ 1319(b) and 1319(d).

4. Notice of the commencement of this action has been provided to the State of Minnesota pursuant to CWA section 309(b), 33 U.S.C. § 1319(b).

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

6. Venue is proper in the District of Minnesota pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), 1391(c), and 1395(a), because Defendants reside in this District, the subject property is located in this

District, and the CWA violations alleged herein occurred in this District.

THE PARTIES

7. The Plaintiff in this action is the United States of America.

8. Defendant Russ Huseby is a private individual residing in Lake County, Minnesota.

9. Defendant Brady Huseby is a private individual residing in Lake County, Minnesota.

STATUTORY AND REGULATORY BACKGROUND

10. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344 ("Section 404 permit").

11. CWA sections 404(a) and 404(d), 33 U.S.C. § 1344(a) and (d), authorize the Secretary of the Army, acting through the Chief of Engineers, to issue Section 404 permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

12. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief,

including a permanent injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

13. CWA section 309(d), 33 U.S.C. § 1319(d), provides that violators of CWA section 301, 33 U.S.C. §§ 1311, are subject to injunctive relief and civil penalties of up to \$25,000 per day for each violation. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat. 1321), such violators are subject to civil penalties of up to \$27,500 for each day of noncompliance after January 31, 1997 through March 15, 2004; civil penalties of up to \$32,500 for each day of noncompliance after March 15, 2004 through January 12, 2009; and civil penalties of up to \$37,500 for each day of noncompliance after January 12, 2009. 40 C.F.R. § 19.4.

14. The term "person" is defined in CWA section 502(5), 33 U.S.C. § 1362(5), to include "an individual".

15. The term "pollutant" is defined in CWA section 502(6), 33 U.S.C. § 1362(6) to include, *inter alia*, "dredged

spoil, solid waste, ... rock, sand, [and] cellar dirt"

16. The term "discharge of a pollutant" and the term "discharge of pollutants" both are defined in CWA section 502(12), 33 U.S.C. § 1362(12), to include *inter alia* "any addition of any pollutant to navigable waters from any point source[.]"

17. The term "point source" is defined in CWA section 502(14), 33 U.S.C. § 1362(14), as "any discernible, confined and discrete conveyance...from which pollutants are or may be discharged."

18. The term "navigable waters" is defined in CWA section 502(7), 33 U.S.C. § 1362(7), as "the waters of the United States, including the territorial seas."

19. The term "waters of the United States" is defined in 33 C.F.R. § 328.3(a) to include: "(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands;...(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;...[and](7) Wetlands adjacent to waters (other than waters that are themselves

wetlands) identified in paragraphs (a)(1) through (6) of this section."

20. The term "wetlands" is defined in 33 C.F.R. § 328.3(b) as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

21. The term "adjacent" is defined in 33 C.F.R. § 328.3(c) as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

22. The term "dredged material" is defined in 33 C.F.R. § 323.2(c) as "material that is excavated or dredged from waters of the United States."

23. The term "discharge of dredged material" is defined in 33 C.F.R. § 323.2(d)(1), in pertinent part, as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." The term includes, but is not limited to, "[t]he addition of dredged material to a specific

discharge site located in waters of the United States" and "[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation."

24. The term "fill material" is defined in 33 C.F.R. § 323.2(e), in pertinent part, as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States."

25. The term "discharge of fill material" is defined in 33 C.F.R. § 323.2(f) as "the addition of fill material into waters of the United States." The term generally includes, without limitation, "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills;...[and] placement of fill

material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills[.]”

GENERAL ALLEGATIONS

26. The defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

27. The real property which is the subject of this complaint is located at and has the legal description of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 14, Township 56 North, Range 8 West, Lake County, Minnesota (hereinafter the “Site”).

28. At all times relevant to this action, the Defendants either owned, leased, or otherwise controlled the Site and/or controlled the activities at the Site.

I. Wetlands on the Site

29. Prior to the activities which are the subject of this complaint, the Site primarily contained a palustrine forested and scrub-shrub wetland. Forest and scrub-shrub wetlands bordering streams generally provide the following functions, among others, to downstream navigable waters: transform and transport detrital energy (organic carbon); transform and sequester nutrients that enter laterally through overland flow; maintain base flow and water levels within the stream

and lake system; and provide habitat and corridors for species that rely on wetlands during their life cycles.

30. The unauthorized discharges on the Site have affected adversely four wetland areas on the Site: "northern area", "southern area," "eastern area," and "central area."

31. All four areas of wetlands on the Site are adjacent to Fortythree Creek, a perennial stream that is a tributary to Lake Superior via the following flow path: Fortythree Creek to Cedar Creek, Cedar Creek to East Branch Beaver River, East Branch Beaver River to Beaver River, Beaver River to Lake Superior.

32. Lake Superior is "currently used...used in the past, or...susceptible to use in interstate or foreign commerce" and, thus, is a navigable water of the United States as defined in 33 C.F.R. § 328.3(a)(1).

33. Fortythree Creek is a relatively permanent water because it has a defined bed and bank, an ordinary highwater mark, and is designated as a perennial stream in the High Resolution National Hydrography Dataset.

34. The wetlands at the Site have a continuous surface connection to Lake Superior, a traditional navigable water, and thus, are waters of the United States. See *Rapanos v.*

United States, 547 U.S. 715 (2006); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).

35. The Corps completed data points confirming that the northern area is wetland. In addition, the northern area directly abuts Fortythree Creek.

36. The eastern area is mapped by the National Wetland Inventory ("NWI") as wetland directly bordering Fortythree Creek.

37. The western portion of the southern area is mapped as wetland by the NWI. An October 2007 Minnesota Department of Natural Resources ("MnDNR") flyover of the area shows surface water throughout much of the area extending east towards the undisturbed areas abutting Fortythree Creek. Corps data points confirm that the southern area is wetland and that the southern area wetland directly abuts Fortythree Creek.

38. The Corps completed data points confirming that the central area is wetland.

39. The wetlands at the Site which are the subject of this action have a significant nexus to Lake Superior and are therefore waters of the United States following *Rapanos*, *supra*, and *Bailey*, *supra*.

40. The segment of the Fortythree Creek adjacent to the

Site is a third order tributary. Third order tributaries, like the Fortythree Creek, generally provide the following functions, among others, to downstream navigable waters: transport energy and nutrients; maintain water levels; and provide important habitat for aquatic organisms.

41. The MnDNR lists both Fortythree Creek and Cedar Creek into which Fortythree Creek flows as designated trout streams.

42. Fortythree Creek and its adjacent wetlands serve to maintain the chemical, physical, and biological integrity of Lake Superior by, among other functions, transforming and transporting energy and nutrients, sequestering and transforming pollutants, and maintaining water levels.

II. Defendants' Knowledge of the Clean Water Act Requirements And Prior Enforcement Action By Corps and MnDNR.

43. In 1995, the Corps was notified that Defendant Russ Huseby had discharged dredged or fill material into 12,580 square feet of wetlands for construction of roads and development of a residential lot.

44. In connection with this discharge, the MnDNR issued a Cease and Desist Order to Russ Huseby dated July 17, 1995.

45. On July 24, 1995, Conservation Officer Keith Edman; Chuck Revak, MnDNR Hydrologist; Wayne Siedel, Lake County Soil and Water Conservation District; Tim Peterson, the Corps; Tom

Martinson, Lake County Land Commissioner; and Richard Sigel, Lake County Planning and Zoning Administrator, inspected the Site.

46. On July 25, 1995, the Corps notified Russ Huseby that the project required a Department of Army permit and might also require State and local permits.

47. On July 27, 1995, the MnDNR notified Russ Huseby that the project required a DNR Protected Waters permit.

48. On July 31, 1995, the Lake County Planning and Zoning Administrator contacted Russ Huseby, by personal service of a letter, stating the project was in violation of the Lake County Land Use Ordinance and ordered him to restore the wetland within 30 days.

49. Russ Huseby applied to the Lake County Planning and Zoning Department for an after-the-fact conditional use permit to build a road, install a fence, and build a 30 foot by 40 foot "pad" for a "screen house".

50. On October 10, 1995, the Lake County Planning Commission held a hearing on the application and approved the permit for a 30-foot by 40-foot filled area with corrections for the damaged wetlands to be determined later.

51. In November 1995, Wayne Siedel met with Russ Huseby

and provided a restoration plan in accordance with the Lake County Planning Commission's conditional use permit.

52. Russ Huseby did not restore the wetland damage as directed by the conditional use permit approved by the Lake County Planning Commission.

53. In November, 1995, the Corps sent Russ Huseby a Notice of Violation of the Clean Water Act ("NOV"). The NOV provided Russ Huseby an opportunity to apply for an after-the-fact permit to retain the dredged or fill material discharged waters of the United States.

54. Russ Huseby submitted an after-the-fact permit application to the Corps in August 1996.

55. In October 1996, the Corps issued Russ Huseby an after-the-fact permit (No. 95-06406-NW-TWP) to retain fill material discharged in 11,280 square feet of wetland. The remaining 1,300 square fee of fill material discharged in the wetland was removed by order of Lake County, Minnesota.

56. The October 1996 after-the-fact permit included the following conditions, among others:

- a. Remove all fill material within 75 feet of Lax Lake and restore the area as directed by Lake County authorities;

b. As compensation for wetlands lost, create a wetland with a minimum area of 11,280 feet, as indicated in a sketch included with the after-the-fact permit; and

c. Submit annual mitigation reports on the status of the mitigation sites, in accordance with the requirements specified in the after-the-fact permit.

57. In June 1998, Corps and Lake County personnel observed that additional fill had been placed at the Site and that Russ Huseby had not complied with the conditions of the after-the-fact permit.

58. The Corps sent a NOV to Russ Huseby for this violation on June 26, 1998, but stated in that letter that it would not take legal action if certain work were performed by July 31, 1998.

59. The Corps later confirmed that the work was completed satisfactorily.

III. The Current Violations

60. In January 2005, the Lake County Planning and Zoning Department notified the Corps that work had been completed in wetlands associated with the construction of access roads.

61. The Corps sent a NOV to Russ Huseby on January 3,

2005 ("the 1/3/05 NOV"). Russ Huseby verbally responded to the 1/3/05 NOV and contended that the roads had been constructed in the wetlands to facilitate logging on the property.

62. The Corps sent a follow-up letter to Russ Huseby on January 7, 2005 requesting additional information about the logging activities.

63. Russ Huseby never responded to the January 7, 2005 letter.

64. On October 25, 2006, the Corps along with MnDNR and Lake County personnel completed a site investigation. Corps personnel confirmed that dredged and fill material had been discharged in wetlands for the construction of access roads and grading of a pasture area.

65. On that same day, the Lake County Planning and Zoning Commission issued Russ Huseby a Cease and Desist Order, under the Wetland Conservation Act, which directed him to cease and desist any "activity draining, filling or excavating wetlands" at the Site.

66. On November 15, 2006, Defendant Russ Huseby submitted an application for wetlands exemption to Lake County.

67. On November 22, 2006, the Corps sent another NOV (the

"11/2/06 NOV") to Russ Huseby with the results of the site investigation.

68. On November 28, 2006, Lake County returned Russ Huseby's application for wetlands exemption as incomplete.

69. On February 12, 2007, Russ Huseby submitted another request to Lake County for wetlands exemption on the cease and desist order.

70. On June 7, 2007, Lake County denied Russ Huseby's request for wetland exemption.

71. On September 19, 2007, MnDNR and Lake County authorities executed a search warrant on the Site to document the extent of fill material discharged in wetlands on the Site. The Corps provided technical assistance at this investigation. It was determined that fill material had been discharged in approximately 19,500 square feet of wetland for construction of access roads. The Corps also noted and documented additional work that had been completed since the October 2006 Site investigation and the 11/2/06 NOV.

72. As of the September 19, 2007 site inspection, three wetland areas ("northern area", "southern area," and "eastern area") had been cleared and the soil graded and much of the areas had been leveled. The areas encompassed 7-10 acres of

wetlands. Some of the area was ditched to drain the wetlands further. Soil and slash piles were placed in the wetlands causing further adverse impacts and constituting additional unauthorized discharges.

73. No permit had been issued by the Corps for the construction of the access roads, the grading activities, or any of the other activities described in this Complaint.

74. On March 19, 2008, Lake County issued an Order to Restore or Replacement of Wetlands or Public Waters for part of the Site (the "3/19/08 Wetlands Restoration Order"). The restoration and replacement was to be accomplished by July 31, 2008.

75. On April 16, 2008, Russ Huseby submitted another application for wetland exemption for the 3/19/08 Wetlands Restoration Order to Lake County and filed an appeal of the 3/19/08 Wetlands Restoration Order to the Board of Water and Soil Resources ("BWSR").

76. On June 16, 2008, the BWSR denied Russ Huseby's appeal. The 3/19/08 Wetlands Restoration Order was affirmed and is final.

77. On September 16, 2008, Lake County officials visited the portion of the site subject to the 3/19/08 Wetlands

Restoration Order. They observed that additional land clearing had occurred on the adjoining land area of the black ash swale wetlands, trees had been removed, and soil cultivated. The affected wetlands had been leveled, and bulldozer tracks were observed in the wetland swales.

78. Russ Huseby acknowledged the work had been performed by tracked and rubber tired equipment.

79. Tree planting and seeding required by the 3/19/08 Wetlands Restoration Order had not been accomplished.

80. Road impacts on wetlands had not been restored as required by the 3/19/08 Wetlands Restoration Order.

81. On March 13, 2009, the Corps sent a letter to Russ Huseby requesting access to the Site. Although Russ Huseby did not respond to this letter initially, he later through a lawyer authorized the Corps to conduct a Site investigation.

82. The Corps conducted that Site investigation on September 21-22, 2009.

83. In the course of conducting the September 2009 Site investigation, the Corps observed that additional work had been performed in wetland areas. This additional work included, but may not be limited to, the fourth wetland area ("central area") being cleared, graded, and leveled.

84. During the September 2009 site investigation, the Corps gathered data that confirmed that the northern area, the southern area, and the central area were all wetlands and that those wetlands had been affected adversely by the clearing, grading, and leveling activities described herein. On information and belief, the eastern area is also wetland. The Corps was unable to collect data to confirm that the eastern area was wetland because the eastern area is owned by an adjacent landowner and the Corps did not have permission from that landowner to access that area at the time of the September 2009 site visit. In addition, during the September 2009 site visit, the Corps established that the northern and southern wetland areas have a continuous surface connection with Fortythree Creek. On information and belief, the central and eastern wetland areas likewise have a continuous surface connection with Fortythree Creek; however, the Corps was not able to confirm these continuous surface water connections during the September 2009 site visit because as stated the Corps did not have permission from the adjacent landowner to access the eastern area and Russ Huseby did not allow further investigation of the central area.

85. During the September 2009 site investigation, Russ Huseby stated to Ben Cox of the Corps that he (Russ Huseby) logged the areas and went through with a rock rake after he performed the logging; that he pulled the rock rake with a tractor that was visible on the site; and that his son, Brady Huseby, had performed the work in the eastern area.

86. On October 1, 2009, the Corps issued yet another NOV ("the 10/1/09 NOV") to Russ Huseby outlining that additional unauthorized grading and discing had occurred since the 2008 aerial photographs of the Site.

87. The 10/1/09 NOV again advised Russ Huseby that the Corps considers the Site to be wetlands and that no additional work may be performed at the Site without Corps authorization.

88. Russ Huseby has not responded to the 10/1/09 NOV.

CLAIM FOR RELIEF

89. The United States hereby restates the allegations set forth in paragraphs 1 through 88 above as if fully set forth herein.

90. From prior to January 2005 through the present, and specifically including between October 25, 2006 and September 21, 2009, the Defendants and/or persons acting on their behalf discharged dredged or fill material into waters of the United States at the Site without authorization from the Corps under CWA section 404.

91. The dredged or fill material that the Defendants and/or persons acting on their behalf caused to be discharged into the wetlands at the Site included, among other things, dirt, spoil, rock, and sand, all of which constituted "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

92. The Defendants and/or persons acting on their behalf used bulldozers, tracked and rubber tired equipment, and other earth-moving equipment to accomplish the discharges of the dredged or fill material into the wetlands at the Site. This equipment constituted "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

93. Defendants did not obtain authorization from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

94. The Defendants either owned, leased, or otherwise controlled the land on which each above-described unauthorized discharge of dredged or fill material into waters of the United States occurred.

95. The Defendants conducted, contracted for, supervised, and/or otherwise controlled the unauthorized discharge activities at the Site as described hereinabove.

96. The Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States, including wetlands, at the Site, as described above.

97. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

98. Unless enjoined, Defendants are likely to allow dredged or fill material to remain in the Site in violation of CWA section 301, 33 U.S.C. § 1311.

RELIEF REQUESTED

WHEREFORE, the United States of America, prays that this Court issue an Order granting the following relief:

1. That the Defendants be enjoined permanently from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

2. That the Defendants be enjoined to undertake measures, at Defendants' own expense and at the direction of the Corps, to effect complete restoration of the Site to the wetlands condition existing prior to the unauthorized discharge activities described in this Complaint;

3. That the Defendants be assessed, pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), civil penalties for their violations of CWA section 301(a), 33 U.S.C. § 1311(a);

4. That the United States of America be awarded its costs and disbursements in this action; and

5. That this Court grant the United States of America
such other relief as the Court may deem just and proper.

Dated: December 30, 2009

B. TODD JONES
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